LIBRARY
SUPREME COURT, U. S.

FILED
JUN 12 1974
MICHAEL RODAK, JR., C

In The

Supreme Court of the United States

October Term, 1973

No. 73- 1866

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(7262) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Statement 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

The Facts 4

Argument:

Point:

I. Police law enforcement officers equipped a cooperating witness with a clandestine recording device in an effort to obtain a recording of a conversation with petitioner Turetsky which would be incriminating and could thus be used against him at a criminal trial. No court order was obtained, nor was petitioner made aware of the existence of this device. Petitioner alleges that United States v. White, 401 U.S. 745 does not and did not authorize this invasion of privacy. 8

II. The prosecution used a surreptitious tape recorder in an effort to entrap petitioner,

Contents

Page

who was a police sergeant, by engaging him in a conversation concerning an alleged bribe. . 17

III. The use of electronic surveillance cannot be dismissed as de minimus since both the Court and the prosecutor emphasized it in the charge and the summation respectively. The Court removed from the jury's consideration the important factual issue as to whether a tape recorder had even been employed, by instructing them that they must assume it had. 19

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Berger v. New York, 388 U.S. 41 . . . . . **12, 15**

Desist v. United States, 394 U.S. 244 . . . . . **13**

Gelbard v. United States, 408 U.S. 41 . . . . . **15**

Hoffa v. United States, (1966) 385 U.S. 293 . . . . . **12**

Holmes v. Burr, 9 Cir. 1973, __F.2d__, 14 Cr. L. 2060 . . . . . **9, 11, 13, 14**

Katz v. United States, 389 U.S. 347 . . . . **2, 8, 9, 11, 12, 13, 14, 15**

Contents

Page

Lee v. Florida, (1968) 392 U.S. 378 . . . . . 12, 16

Lewis v. United States, (1966) 385 U.S. 206 12

Linkletter v. Walker, 381 U.S. 618 9

Lopez v. United States, 373 U.S. 427 . . . . . 8, 11, 12

Mapp v. Ohio, 367 U.S. 643 . . . . . .9, 12

On Lee v. United States, 343 U.S. 747 . . . . . .8, 11, 12, 13

Osborn v. United States, 385 U.S. 323 . . . . . 12, 16

Rathbun v. United States, (1957) 355 U.S. 107 12

Russell v. United States, 411 U.S. 423 . . . . . 16, 17

Schwartz v. Texas, (1952) 344 U.S. 199 12

Silverman v. United States, (1961) 365 U.S. 505 12

Sherman v. United States, 356 U.S. 369 18

United States v. White, 401 U.S. 745 . . . . . 2, 8, 9, 12, 13, 14, 15, 16

Contents

Page

Statutes Cited:

Omnibus Crime Control and Safe Street Acts of 1968, Title III 3, 16

47 U.S.C. Section 605 12

28 U.S.C. Section 1257(3) 2

18 U.S.C. Section 2518 16

18 U.S.C. Section 2518(5) 3

18 U.S.C. Section 2518(8)(d)(3) 3

18 U.S.C. Section 2518(10)(iii) 3

18 U.S.C. Section 2518(10)(a)(ii) 3

N.Y. Criminal Procedure Law:

Section 700.30(5)(7) 3, 16

Section 700.35(1) 3, 16

Section 700.50(3)(4) 16

New York Penal Law:

Section 200.10 . . . . . 1, 3

Section 155 3

Section 110 3

Contents

Page

United States Constitution Cited:

Fourth Amendment 3, 9, 10, 13, 14, 16, 17, 18

Fifth Amendment 3, 18, 19

Sixth Amendment 3, 18

Fourteenth Amendment 10

Rule Cited:

Exclusionary Rule 10

Other Authority Cited:

Donnelly, Judicial Control of Informants, Spies, Stoolpigeons and Agents Provocateurs, 60 Yale L.J. 1091, 1111 (1951) 17

APPENDIX

Order of Appellate Division Dated November 9, 1971 . 1a

Certificate Denying Leave Dated December 8, 1971 . . 3a

Certificate Denying Leave Dated March 14, 1974 . . . . 4a

In The

Supreme Court of the United States

October Term 1973

No. 73-

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT

Petitioner, Fred Turetsky petitions this Court and prays that it grant a writ of certiorari to review the order of the Appellate Division, First Department, rendered the ninth day of November, 1971, affirming the judgment of the Supreme Court, New York County rendered the seventh day of January, 1970, convicting petitioner of bribe receiving (New York Penal Law §200.10); petit larceny; and attempted petit larceny, after trial. The Court of Appeals of the State of New York denied leave to appeal on the eighth day of December, 1971, but a rehearing and reconsideration of the application for leave to appeal was denied on the fourteenth day of March, 1974.

OPINION BELOW

The Appellate Division, First Department, rendered no opinion in unanimously affirming the judgment of conviction. The Court of Appeals did not render an opinion in denying leave to appeal.

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. Section 1257(3). A motion for leave to appeal to the Court of Appeals was denied on March 14, 1974 upon reargument and reconsideration. Copies of the orders in question are annexed to the petition.

QUESTIONS PRESENTED

1. Whether this Court's plurality opinion in *United States v. White,* 401 U.S. 745, which concerned a case predating *Katz v. United States,* 389 U.S. 347, was intended to permit secret recordings of conversations between a Government agent and a defendant merely because the Government agent consented to the electronic surveillance?

2. Whether *United States v. White,* 401 U.S. 745, should be limited to the peculiar circumstances of that particular case and whether this Court should now declare that recordings of conversations shall be inadmissible without a court order authorizing electronic surveillance, unless both parties consent to the electronic surveillance?

3. Whether this Court should now rule that court orders or warrants are necessary to conduct electronic surveillance of any prospective defendant by law enforcement authorities, even when one party to the conversation has consented to the recording?

4. Whether petitioner was denied a fair trial when the Court invaded the province of the jury by expressing an opinion as to the importance of a fact issue and when the District Attorney trying the case made inflammatory statements?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, and Sixth Amendments of the United States Constitution are involved herein as well as Sections 200.10, 155, and 110 of the Penal Law and Sections 700.30(5)(7), 700.35(1), and 700.50(3)(4) of the Criminal Procedure Law. In addition, 18 U.S.C. Section 2518(5); 2518(8)(d)(3); 2518(10)(iii); and 2518(10)(a)(ii) are involved herein. Other authorities involved are the Omnibus Crime Control and Safe Streets Act of 1968, Title III.

5. Whether petitioner was entrapped by the surreptitious electronic recording of a conversation between Turetsky and a police informer?

THE FACTS

The petitioner herein, a career New York City Police Sergeant, attached to the New York City Police Department, was indicted under three counts which charged bribery by Turetsky from one Jay Shaw, for the alleged consideration of agreeing to accept $160 so that Shaw would not receive complaints or summonses for violations in connection with remodeling work he was doing in the Borough of Manhattan. In addition, the indictment charged that petitioner stole" $60 from Shaw and also attempted to steal $100 from him (SM42-43)[1].

The facts of the case are relevant only to the point of highlighting the Constitutional issues involved here.

The complainant, Jay Shaw, was supervising a renovation of a building at 234 East 18th Street in the Borough of Manhattan and testified that on June 2, 1969, during these renovations, the petitioner approached him and sought to obtain certain moneys, in consideration of which Shaw would not be bothered with tickets or summonses for double-parked trucks, nor for any other violations caused by the work that was in progress (SM57-63).

Shaw notified the police and was coached by law enforcement authorities as to what to do in any future conversation with the petitioner. In this connection, a recording device was used as well as certain marked money (SM64-65, SM458). The tape recorder was set up on Shaw's desk and was operating when petitioner came in.

---

1. Numerals in parentheses preceded by the prefix "SM" refer to pages of the official court reporter's minutes of the trial.

Shaw testified that he agreed to pay $160 to the petitioner during the period of construction and actually gave Turetsky $60, promising to give another sum about August 1st when the job would be finished (SM69-76).

Petitioner was then followed to a patrol car and was subsequently arrested (SM76, SM257, SM331, SM465, SM618-622; SM663).

Officer Fitzpatrick, who was present when the petitioner was arrested, stated that he did not find any money on Turetsky's person, but the complainant Shaw testified that he saw Turetsky throw the money to the ground (SM70, SM465, SM470).

A test was conducted on Turetsky's hands for the presence of fluorescent powder which allegedly had been dusted on the money which Shaw said he had handed to Turetsky. The test, however, proved negative (SM475-477).

The prosecution played the tape recording which had been obtained under the aegis of the police, with the consent of Shaw, but without the knowledge or consent of Turetsky.

In his defense, the petitioner called several witnesses, including Patrolman Morris of the 13th Precinct, who testified that he was petitioner's driver on June 2, 1969 and that during that morning he did not take Turetsky to the building in question.

Patrolman Grabowsky testified that on June 3, 1969, he and Patrolman Gilbride drove Sergeant Turetsky to the building at 234 East 18th Street. When petitioner came out of the building and re-entered the police car, Grabowsky recalled that Captain Fitzpatrick arrested petitioner. Grabowsky further declared that

he did not see Turetsky put his hands into his pockets or throw any money to the ground, nor did he see anyone bend down and pick up any money (SM608, SM618-621, SM623-625).

Patrolman Gilbride also testified for the petitioner and substantially corroborated the testimony of Grabowsky. Gilbride also stated that he heard no mention of any marked money, powdered money, or any tape recording machine (SM666, SM679).

Several other officers testified as well and each declared that they had not seen or heard any tape recording. Moreover, Sergeant Zgombic stated that petitioner had not refused to submit to any ultraviolet ray test and that at the precinct he had not seen any marked money, tapes, or tape recorders (SM749-751)[2].

In summation the prosecution relied to a great extent upon the tape recording, stating, *inter alia:*

> "I submit to you, ladies and gentlemen, that we have proven the guilt of this defendant of the charge beyond all doubt. And we are able to do that because we have here this tape, which is a transcription of a conversation which took place between this defendant and the complainant, Mr. Shaw" (SM1068).

Shortly before concluding his address to the jury, the District Attorney said to them the following:

---

2. It must be noted, however, that at the trial there was an issue as to the identity of the voices on the tape recording since petitioner never admitted his voice was on that tape recording.

> "Now, I suggest to you ladies and gentlemen that a lot of people are interested in your verdict. There are fifteen sergeants mentioned on the tape. They are not on trial. But they are interested in the verdict. So is the whole Police Department" (SM1069).

Defense counsel objected to this statement on the ground that it was "highly prejudicial and improper" (SM1069). His objection was overruled (SM1069).

The Court, in its charge, also informed the jury of the tape recorder (SM1088), stating:

> "There was other testimony that no one was seen bringing into the precinct the *attache case, tape recorder,* or satchel with the ultraviolet equipment. *However, these items were evidently there as they were used.*" (Emphasis supplied.)

After the Court had concluded the charge, counsel for the defendant moved for a mistrial because of "the Court's. . .forcing its opinion as to the guilt or innocence of the defendant on the jury" (SM1116).

ARGUMENT

POINT I

Police law enforcement officers equipped a cooperating witness with a clandestine recording device in an effort to obtain a recording of a conversation with petitioner Turetsky which would be incriminating and could thus be used against him at a criminal trial. No court order was obtained, nor was petitioner made aware of the existence of this device. Petitioner alleges that United States v. White, 401 U.S. 745 does not and did not authorize this invasion of privacy.

The prosecution elected to use electronic surveillance in this case in an effort to corroborate the statements of the sole witness against petitioner, namely Jay Shaw.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since the Supreme Court's decision in *United States v. White,* 401 U.S. 745. It, of course, had also been used previous thereto, but many law enforcement agencies apparently look upon *White* as authorization or *carte blanche* to use this method of electronic surveillance.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and concerned a case which predated *Katz v. United States,* 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States,* 343 U.S. 747 and *Lopez v. United States,* 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the *"reasonable expectation of privacy"* standard of *Katz v. United States,* 389 U.S. 347, and we maintain should therefore be abolished. (See *Holmes v. Burr,* 9 Cir. 1973,__ F.2d__ 14 Cr.L. 2060.)

It will be recalled that Justice Black's cryptic concurrence in *United States v. White, supra,* mentioned the fact that it did not apply since this was pre-*Katz* eavesdropping.

Justice Black cast the "swing"vote in *United States v. White* and his concurrence in the judgment of the Court was for the reason set forth in his dissent in *Katz v. United States,* 389 U.S. 347, 364. He, however, also noted "his adherence" to "his views expressed in *Linkletter v. Walker,* 381 U.S. 618." In *Linkletter,* Mr. Justice Black maintained that *Mapp v. Ohio,* 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White,* Justice Black reasserted the position which he had taken in *Katz* namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States,* however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United* States.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance

to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. *These arguments do not hold up.*

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, gestures, and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsman of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth

> Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?"

(Dissent of Hufstedler, J. in *Holmes v. Burr, supra.)*

The dissenting opinion in *Holmes v. Burr, supra,* went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation . . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States.* There the Court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States, supra,* 343 U.S. at 753-54 and *Lopez v. United States, supra,* 373 U.S. at 439. In *Lopez* the majority added the variation that a person talking face-to-face with a known

Government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality on *United States v. White.*

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz.* Thus, *On Lee* and *Lopez* not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States,* (1961) 365 U.S. 505; *Osborn v. United States,* 385 U.S. 323, and *Berger v. New York,* 388 U.S. 41, and destroyed by *Katz.*

Rathbun v. United States, (1957) 355 U.S. 107 dealt with Governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. Section 605). *Schwartz v. Texas,* (1952) 344 U.S. 199 involved facts similar to *Rathbun,* but the decision was based on the pre-*Mapp* authority refusing to apply the exclusionary rule to state Courts. *Schwartz* was overturned by *Lee v. Florida,* (1968) 392 U.S. 378, a post-*Mapp* case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. *Lewis v. United States,* (1966) 385 U.S. 206 and *Hoffa v. United States,* (1966) 385 U.S. 293, like *Holmes,* concerned the use of confidants who were secretly Governmental informers, but in neither case was electronic surveillance employed.

The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes*. But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided and *Katz* had been earlier held nonretroactive in *Desist v. United States*, 394 U.S. 244, *United States v. White*, is nevertheless important because it reveals continuing reliance by some of the Justices on the assumption of the risk doctrine. (See *United States v. White*, at 754 (White, J.).)

Although the holding in *White* was based upon the nonretroactivity of *Katz*, several of the Justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested that *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz*. Mr. Justice Black, concurring in the judgment of the Court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of Government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr, supra,* sets forth a cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr.L. 2063, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominant remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. *If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."* (Emphasis added.)

We recognize that this Court has not specifically interpreted the significance of *United States v. White, supra,* since its promulgation by this Tribunal. Apparently the Court below, as well as prosecutors, have assumed that invasions of privacy are perfectly legitimate so long as one party to a conversation consents.

In *Katz v. United States, supra,* we submit, this Court indicated a contrary sentiment, namely that the Fourth Amendment protects people and not places. Moreover, the clear

thrust of *Katz* is that the party to whom *Katz* placed a call in the public telephone booth that was "bugged", could not have consented to the "bug" which was placed without a warrant.

In *Berger v. New York*, 388 U.S. 41, this Court recognized that invasions of privacy by electronic listening devices represents one of the most dangerous and fearsome incursions upon privacy and civil liberty.

United States v. White, supra, represents a plurality opinion only and has never been dealt with by a majority of the Court.

In *Gelbard v. United States*, 408 U.S. 41, this Court indicated that a person who has suffered an invasion of privacy through illegal methods cannot even be made the subject of a Grand Jury subpoena if the purpose is to examine him concerning material obtained through improper electronic surveillance. We submit that petitioner herein had every reason to believe that his conversations with Shaw were not being recorded and were private. Shaw was obviously playing out a scenario suggested to him by the authorities and, consequently, elicited conversations designed to incriminate. There was no free and natural flow of conversation from the standpoint of Shaw. This was an undoubted invasion of privacy from the viewpoint of Turetsky who believed the conversation was private.

We submit that under those circumstances a Court order should have been obtained before the Government undertook to equip Shaw with this listening device.

We remind this Tribunal that in *Osborn v. United States,* 385 U.S. 323 at 330, this Court explained that since District Judges granted what amounted to a warrant authorizing the use of a recording device, that this was the only reason for upholding the invasion of privacy apparent therein. This Court explained:

> "There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance'."

In *Russell v. United States,* 411 U.S. 423, this Court indicated that "outrageous" conduct by law enforcement officers or agents would be dealt with in an appropriate manner.

Similarly, in *Lee v. Florida,* 392 U.S. 378, this Court made it clear that barring such improper eavesdropping was the only effective deterrent to such lawless conduct.

We urge this Court, therefore, to clarify *United States v. White, supra,* and rule that a court order is required before any electronic surveillance, even with the consent of one party, is conducted under Government auspices, otherwise the evidence must be suppressed.

We ask this Court to also consider the warrant requirements of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, and, particularly, Sections 700.30(5)(7) and 700.35(1) and 700.50(3)(4) of the New York Criminal Procedure Law, as well as 18 U.S.C. Section 2518.

We would also cite this Court the Fourth Amendment as indicating the general need for warrants where any invasion of privacy is involved.

POINT II

The prosecution used a surreptitious tape recorder in an effort to entrap petitioner, who was a police sergeant, by engaging him in a conversation concerning an alleged bribe.

The petitioner maintains that he was the victim of entrapment, and perhaps of forgery, since he never conceded that his voice was on the tape recording

> "Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wiretapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the criminal classes, justifies the employment of illegal means." Donnelly, Judicial Control of Informants, Spies, Stoolpigeons and Agents Provocateurs, 60 Yale L.J. 1091, 1111 (1951).

In *Russell v. United States*, 411 U.S. 423, this Court indicated that entrapment is a valid defense unless a predisposition is shown on the part of the accused. In the case at bar, we submit that there was no evidence of any predisposition.

Since an invasion of privacy without a warrant was utilized in this case, it smacked of improper Governmental action in violation of the Fourth, Fifth and Sixth Amendments since Shaw was undoubtedly playing out a scenario as a cooperating agent of law enforcement.

It may well be that Shaw was, in essence, seeking to bring charges against a completely innocent police officer (Turetsky) because the latter was trying to do his duty too diligently. We must bear in mind that Shaw was the only witness to testify to any criminality, since the tape recording was not a testimonial declaration and was merely a repetition of Shaw's sworn statements. The recordings had no independent testimonial value.

Additionally, the ultraviolet test for the presence of flourescent powder on Turetsky's hands proved negative.

In *Sherman v. United States*, 356 U.S. 369, the concurring opinion of Justice Frankfurter at 380 aptly explains:

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced . . .insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or by means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

POINT III

The use of electronic surveillance cannot be dismissed as de minimus since both the Court and the prosecutor emphasized it in the charge and the summation respectively. The Court removed from the jury's consideration the important factual issue as to whether a tape recorder had even been employed, by instructing them that they must assume it had.

We have previously quoted certain portions of the summation of the prosecution which refer to the tape recording which appeared to be the single most important factor in the mind of the District Attorney (SM1068, 1069).

The Court in essence removed the question of fact from the jury as to whether there was or was not a tape recording by, in effect, charging them that the tape recorder was used.

It must be recognized that a number of police officers stated that although they were present in or about the scene of the arrest or at the stationhouse to where petitioner was taken, they did not see any tape recordings nor tapes. This in effect removed an essential element from the consideration of the jury, thus depriving petitioner of a fair trial in violation of the Fifth Amendment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik

Attorney for Petitioner

APPENDIX

ORDER OF APPELLATE DIVISION DATED NOVEMBER 9, 1971

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 9, 1971.

Present—
Hon. Louis J. Capozzoli, Justice Presiding
Hon. Arthur Markewich,
Hon. Francis T. Murphy, Jr.,
Hon. Aron Steuer,
Hon. Samuel W. Eager, Justices

The People of the State of New York,

Respondent,

against

Fred Turetsky,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Baer, J.) rendered on January 7, 1970, convicting him of Bribe Receiving (Penal Law § 200.10), Petit Larceny (Penal Law §155.25) and Attempted Petit Larceny (Penal Law §§110.00,

155.25), and said appeal having been argued by Mr. Victor J. Herwitz, of counsel for the appellant, and by Mr. Paul A. Sobell, of counsel for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

HYMAN W. GAMSO

Clerk.

CERTIFICATE DENYING LEAVE DATED DECEMBER 8, 1971

STATE OF NEW YORK

COURT OF APPEALS

Before: Hon. John F. Scileppi, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

against

FRED TURETSKY,

Appellant.

I, JOHN F. SCILEPPI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 460.20 of the Criminal Procedure Law and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Kew Gardens, New York
December 8, 1971

s/John F. Scileppi
Associate Judge

CERTIFICATE DENYING LEAVE DATED MARCH 14, 1974

STATE OF NEW YORK

COURT OF APPEALS

Before: Hon. Charles D. Breitel, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

FRED TURETSKY,

Defendant-Appellant.

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application for reconsideration of a prior denial of an application made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at:

New York, New York

March 14, 1974

Certificate Denying Leave Dated
March 14, 1974

s/Charles D. Breitel
Chief Judge

Irving Anolik, Esq.
225 Broadway
New York, New York 10007

Hon. Richard H. Kuh
District Attorney, New York Co.
155 Leonard Street
New York, New York

Clerk, Court of Appeals

*Description of Order: 11-9-71 App. Div. 1st affmd. Sup. Ct. N.Y.Co 1-7-70

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1866

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD H. KUH
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Jurisdiction	2
Statement of the Case	2
Argument	
Point I—The petition is untimely	5
Point II—Petitioner's specious claim that his Fourth Amendment rights were violated when the individual from whom he solicited a bribe recorded their conversation does not present a substantial federal question worthy of review by this Court	6
Conclusion	8

TABLE OF AUTHORITIES

PAGE

Cases:

American Railway Express Co. v. Levee, 263 U.S. 19 (1923) 5

Berenzi v. Immigration Director, 385 U.S. 630 (1967) 7

Conboy v. First Nat'l Bank, 203 U.S. 141 (1906) 5

Department of Banking v. Pink, 317 U.S. 264 (1924) 5

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 7

Grayson v. Harris, 267 U.S. 352 (1925) 7

People v. Muller, 11 N.Y.2d 154, 227 N.Y.S.2d 421, 182 N.E. 2d 99 (1962) 6

People v. Turetsky, 37 A.D.2d 1046 (1st Dept.), 326 N.Y.S.2d 369 (1971) 4

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 7

United States v. Johnston, 268 U.S. 220 (1925) 7

United States v. White, 401 U.S. 745 (1971) 6, 7

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1866

FRED TURETSKY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Fred Turetsky seeks certiorari to review an order of the New York Supreme Court, Appellate Division, First Department, rendered November 9, 1971, which unanimously affirmed, without opinion, a judgment of the Supreme Court of the State of New York, New York County, convicting him, after a jury trial, of BRIBE RECEIVING (New York Penal Law §200.10), PETIT LARCENY (New York Penal Law

§§110.00, 155.25), and sentencing him to probation for five years. On December 3, 1971, then Associate Judge JOHN F. SCILEPPI, denied petitioner's application for permission to appeal to the New York Court of Appeals, and on March 14, 1974, Chief Judge CHARLES BREITEL denied leave to appeal a second time, following an application to reconsider the earlier decision.

Jurisdiction

The petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

Statement of the Case

In 1969, the petitioner, Fred Turetsky, was tried for soliciting a bribe from a businessman, Jay Shaw. The evidence showed that on the morning of June 2, 1969, Jay Shaw was supervising the renovation of his brownstone dwelling in Manhattan, when then Police Sergeant Fred Turetskey, entered the building. Turetsky told Shaw that in exchange for $40 a month none of the police officers in the local precinct would issue him tickets for violations caused by the renovation. Shaw delayed giving Turetsky an answer, and the following day he contacted the Chief Inspector's Investigating Unit of the Police Department.

This unit promptly dispatched three of its officers, Captain William Fitzgerald, Lieutenant James Slevin and Sergeant Francis Lynch, to meet Shaw. After Shaw explained the situation to them, they escorted Mr. Shaw back to his

building where they gave him a tape recorder and three $20 bills whose serial numbers had been recorded.

Turetsky returned to the premises a few minutes later and, as Shaw testified at trial, reiterated his demands for money. He explained to Shaw at great length that he was demanding $40 a month for each of the four months of the renovation in return for certain "courtesies"—immunity from tickets for violations of law in connection with Shaw's building construction. Turetsky insisted that the amount of money was justified because other sergeants in the precinct would have to be cut in. Shaw gave Turetsky, as a down payment on the $160 bribe, the same three $20 bills that had been given him by the officers from the Investigating Unit.

Turetsky left the building but was promptly stopped by Captain Fitzgerald. Turetsky, realizing that he had been caught in the act, attempted to finagle his way out by saying to the captain, "Can't we straighten this thing out?" When the captain made it plain that he would not be deterred in his duty, the petitioner turned and said to Shaw: "You are a Jew and I am a Jew, why don't we forget this?" But Shaw would not be swayed either. So the petitioner, in an act of desperation, reached into his pocket and, as Captain Fitzgerald described it, made a backward motion with his hand. Shaw saw that the petitioner was throwing the money to the ground. Lieutenant Slevin picked up the money, three $20 bills, with the same serial numbers as those given to Shaw. At the trial, the People introduced the recordings made by Shaw of his conversation with petitioner. They showed that Turetsky

expounded at great length as to the amount, whys and therefores of the bribe.

The theory of the defense was that Turetsky visited Shaw's place on June 3rd to fill out a temporary building permit, a UF-14 card, concerning the building's renovation; and it introduced into evidence the UF-14 card Turetsky allegedly had filled out on that date. It contained, *inter alia*, Shaw's telephone number. On rebuttal, however, the People introduced into evidence the telephone company's records which showed that this telephone number had not been assigned to Shaw until September of that year, three months after the arrest.

At the conclusion of the trial the jury convicted petitioner of bribe receiving, petit larceny and attempted petit larceny and, on January 7, 1970, he was sentenced to five years' probation. Thereafter, on November 9, 1971, the Appellate Division of the Supreme Court of the State of New York, First Department, affirmed the judgment, without opinion. *People* v. *Turetsky*, 37 A.D.2d 1046 (1st Dept.), 326 N.Y.S.2d 369 (1971). Leave to appeal to the New York Court of Appeals was denied on December 3, 1971 by then Associate Judge JOHN F. SCILEPPI.

For some two and a half years Turetsky took no steps to challenge the judgment of conviction. Then, in a letter dated March 4, 1974, he applied for reconsideration of his application for leave to appeal to the New York Court of Appeals. On March 14, 1974, Chief Judge CHARLES BREITEL denied leave to appeal.

On June 12, 1974, Turetsky served the instant petition for a writ of certiorari, arguing that his Fourth Amendment rights were violated by the introduction into evidence of his recorded conversation with Shaw and that the evidence against him was manufactured to deter him from fulfilling his duties as a police officer.

ARGUMENT

POINT I

The petition is untimely.

Petitioner's application for leave to appeal to the New York Court of Appeals was denied on December 3, 1971. The 90 days in which he had to file his petition [Rule 22] began to run from that date. *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923). The instant petition was not filed for some two and one-half years and is, therefore, untimely. Although no attempt to explain the untimeliness of his petition is made, Turetsky apparently justifies the filing date because the petition was filed within 90 days after his second application for leave to appeal to the Court of Appeals was denied.

While the filing of an application for rehearing in the state court tolls the time within which the petition for certiorari must be filed [*Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1924)], in the absence of a state rule setting the time to file for a rehearing, such application must be made before the time to take the case to this Court expires. *Conboy* v. *First Nat'l Bank*, 203 U.S. 141, 145 (1906). Since New York does not have a time limitation

within which to file for reconsideration of applications for leave to appeal [*see People* v. *Muller,* 11 N.Y.2d 154, 227 N.Y.S.2d 421, 182 N.E.2d 99 (1962)]. Petitioner's failure to file for reconsideration within 90 days after the first application was denied, renders this petition untimely.

POINT II

Petitioner's specious claim that his Fourth Amendment rights were violated when the individual from whom he solicited a bribe recorded their conversation does not present a substantial federal question worthy of review by this Court.

Petitioner argues that certiorari should be granted because Jay Shaw, using a tape recorder supplied by the police, recorded a conversation in which Turetsky solicited a bribe. In effect, he argues that this Court should reconsider its decision in *United States* v. *White,* 401 U.S. 745 (1971), where five Justices of this Court held that recording or intercepting a conversation by law enforcement officials, with the consent of one party to the conversation, does not violate the Fourth Amendment.

Petitioner has not shown that the federal question posed in this petition was raised or passed upon in either the trial court or in the Appellate Division of the Supreme Court. Indeed, the issue presented to this Court appears to have been argued by petitioner for the first time in his application for a reconsideration of his request for leave to appeal to the New York Court of Appeals. Since the federal question was not passed upon by the Appellate Division, the court at which the petition for certiorari is

addressed, this petition should be denied. *See Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935).

Moreover, certiorari should not be granted if the question raised has previously been determined by the Court or is lacking in substance; there must be "[s]pecial and important reasons to warrant the exercise of discretion." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70 (1955). The questions raised by Turetsky's petition are neither novel nor "special" and have recently been rejected by this Court in *United States* v. *White, supra.*

Additionally, petitioner maintains that "he was the victim of entrapment" by Shaw who allegedly was "seeking to bring charges against a completely innocent police officer (Turetsky) because the latter was trying to do his duty too diligently" (petition, pp. 17, 18).

Although using the nomenclature "entrapment," Turetsky in fact claims that the testimony against him was concocted and that the witnesses against him committed perjury. Rather than raising a federal constitutional question, this argument presents a question of fact. Certiorari will not be granted solely to review evidence and discuss facts. *Berenzi* v. *Immigration Director,* 385 U.S. 630 (1967); *United States* v. *Johnston,* 268 U.S. 220 (1925); *Grayson* v. *Harris,* 267 U.S. 352 (1925).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. KUH
District Attorney
New York County

LEWIS R. FRIEDMAN
ROBERT A. GOLDSCHLAG
Assistant District Attorneys
Of Counsel

July, 1974